



IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77 - 960

CLINTON MUNICIPAL SEPARATE SCHOOL DISTRICT

Petitioner

v.

THE UNITED STATES OF AMERICA, et al

Respondents

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on September 26, 1977.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Mississippi which is unreported, is set out in the appendix, infra, p. 1. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 560 F.2d 1188 and is set out in the appendix, infra, p. 27.

JURISDICTION

The judgment of the Court of Appeals was entered on September 26, 1977 (App., infra, p. 32). A timely petition for rehearing was denied on October 28, 1977 (App., infra, p. 33). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Consistent with Swann v. Mecklenburg Board of Education, Wright v. Council of the City of Emporia, and Pasadena City Board of Education v. Spangler, can a separate school district, established after the implementation of Court approved HEW desegregation plan without segregative motives and utilizing boundaries established by such plan, and which has operated a unitary educational system from its inception; be enjoined from further independent operation in order to pair said separate school district with several schools from the County school district from which the separate school district was removed after the implementation of the Court approved plan.

STATEMENT OF THE CASE

Petitioner Clinton Municipal Separate School District (Hereinafter referred to as CMSSD) was established in July, 1970. The boundaries, facilities, faculty and pupil assignments adopted by the CMSSD were those provided by a permanent HEW desegregation plan approved by the Fifth Circuit Court of Appeals, relative to Hinds County SD in opinion delivered November 11, 1969, U. S. v. Hinds County School Board, 423 F2d 1264 (5th Cir. 1969). The HEW plan divided Hinds County into seven distinct Attendance Zones, including the Clinton Attendance Zone. That plan was implemented January 1, 1970. The provisions of the HEW plan have been complied with by both Hinds County SD and CMSSD to date.

The City of Clinton is located in Hinds County, Mississippi, adjacent to the State Capital and largest city, Jackson, also located in Hinds County. Hinds County is by far the most populous county in Mississippi. Geographically, Hinds is the third largest of 82 counties in Mississippi, containing 876 square miles. The City of Clinton has experienced phenomenal growth over the last decade.^{1/} With increase

^{1/} The population of the City of Clinton has grown from approximately 3,400 in 1960; approximately 7,000 in 1970; to more than 12,000 in 1976. (R-479-480, Clinton School Exhibit No. 7). The estimate for 1980 is approximately 18,000. (R481). The geographical area of the City of Clinton has more than doubled from 1970 to 1977. (R-484).

in the population of Clinton came a requirement for additional educational facilities. As a part of the Hinds County school district, a county-wide vote was necessary to pass bond issues to finance the construction of educational facilities needed in Clinton.^{2/}

CMSSD was established to assure the availability of finances as required in the construction of needed facilities and to return to Clinton local control over the educational system. The CMSSD as established has always and is operated as a non-discriminatory unitary system where no child is assigned to schools on the basis of race. The motives of the local officials in establishing the CMSSD are not under attack.^{3/} After the Court approved desegregation plan was accepted and implemented, January 1, 1970, the City established its own separate school district pursuant to State statutes, utilizing the boundaries defined and assigned to it by the

^{2/} A bond issue to build Northside School at the City of Clinton failed as a Hinds County issue three times before passing by a narrow margin in 1968. In 1972 a CMSSD bond issue to build Eastside Elementary School passed by an 83% majority on the first vote. (R-487).

^{3/} Any suggestion that motive or intent was not a factor considered by this Court in Emporia and Scotland Neck overlooks the fact that the motive issue was what apparently split this Court in those cases decided the same day. Compare dissent in Emporia with concurrence in Scotland Neck.

Court approved HEW plan.^{4/}

Both the CMSSD and the Hinds County school district are operating unitary systems. At the time of the hearing before the District Court there existed in Hinds County three schools out of a total of 17 which were virtually all black. None of these were in the Clinton Attendance Zone (CMSSD). The three primarily black schools were in two other and different attendance zones of the Hinds County SD. The existence of these three all black schools resulted apparently from non-attendance of whites assigned to those schools. Those white have not, however, attended school in the CMSSD. The position of the U. S. is and has been throughout these proceedings that the CMSSD should be dissolved in order to facilitate pairing of the Clinton schools with two of these black schools. The U. S. does not contend that Hinds County is not a unitary system as a whole, but merely that three schools out of seventeen are primarily black. The U. S. does not even contend that the existence of these three schools is an effect of the creation of the CMSSD. The U. S. contends that the CMSSD should be

^{4/} The Fifth Circuit's opinion acknowledges that the local officials acted without segregative intent at footnote 6: "The District Court was correct in its ruling that the timing of CMSSD's separation could not be used to establish an impermissible motive. Indeed, our ruling assumes that the motives of the Clinton MSSD are free from any taint. The question is not one of motive but of effect...."

dissolved in the hope of eliminating racial imbalance in two of 17 County schools.^{5/}

During June, 1970, CMSSD advised the U. S. of its intent to establish a separate school district. On November 30, 1970, the CMSSD served notice to the parties in cause number 76-4436, U. S. A. v Hinds County School Board of its establishment, by a motion filed with the Court of Appeals, Fifth Circuit, to sever CMSSD. On September 27, 1972, amicus curiae (NAACP Legal Defense and Educational Fund, Inc.) filed a motion to dissolve the CMSSD. On April 23, 1976, the United States filed a motion to enjoin the continued operation of the CMSSD. Finally on May 19, 1976, an evidentiary hearing regarding all motions was had before the District Court. All parties submitted briefs and on November 12, 1976, the District Court rendered its opinion. Relying on Swann v. Charlotte Mecklenburg Board of Education, 402 U. S. 1 (1971), Wright v. Council of the City of Emporia, 407 U. S. 451 (1972), and United States v. Scotland Neck City Board of Education, 407 U. S. 484 (1972), the District Court found that the establishment of the Clinton MSSD had had little disparate effect on the remainder of the Hinds County District with the exception of eliminating the majority to minority

^{5/} One of the three black school is within the area annexed by the City of Jackson. Both Emporia and Scotland Neck were addressed to the effect of the separation on an entire school system not individual schools.

transfer feature which feature was found by the District Court to have been historically minimal. The U. S. appealed.

A panel of the Court of Appeals for the Fifth Circuit vacated and remanded the order of the District Court. It held that the District Court had failed to use the proper standards to evaluate effect and should keep in mind, on remand, the three tests approved in Emporia.^{6/} The Panel found error also in the District Court's "noting that the boundaries adopted by the Clinton MSSD were the same as the zone boundaries drawn by HEW..." (App., infra, p. 4). In addition to the error found, two additional criteria were set forth by the Court of Appeals which would require the District Court to measure effect by "the broader impact of the permanency of the CMSSD's boundaries as opposed to the tentative nature of HEW boundaries.^{7/} The Panel also noted that recent expansion of the corporate limits of the City of Jackson in July, 1977 would have an effect on the Hinds County school system and that

^{6/} The Fifth Circuit's opinion (App. infra, p. 31) enumerated the criteria: (1) Changes in student composition (2) changes in educational quality (3) timing. Those exact tests were thoroughly discussed in the District Court's opinion, (App. infra, pp. 17-18).

^{7/} Petitioners have found no authority in support of such a position. Such a position obviously contemplates periodic adjustment of attendance zones, a position repeatedly rejected by this court. Swann, Pasadena.

this demographic change should also be considered in measuring effect upon the Hinds County SD. Finally, the Court of Appeals enunciated its own test to be applied on remand. This test would require the District Court to find, before it could deny the motion of the U. S., that "the separate existence of the Clinton MSSD does not adversely affect the ongoing desegregation process in the Hinds County school district...." (App., infra, p. 31). The record clearly reflects, and the District Court so found, that since the inception of the CMSSD the percentage of blacks had increased in the CMSSD while the percentage of blacks in Hinds County had decreased.^{8/} Therefore, the District Court had already made that factual determination for which the Fifth Circuit felt remand necessary. (App., infra, p. 24).

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the decision of the Court of Appeals is in conflict with prior decisions of the Supreme Court of the United States.

The question presented involves a determination of whether local authorities are precluded from es-

^{8/} The Black to White ratio in Hinds County SD in November, 1970, was 66% Black to 34% White. The ratio in December, 1975, was 58% Black to 42% White. The Black to White ratio in Clinton Attendance Zone in November, 1970, was 15% Black to 80% White. The ratio in December, 1975, was 19% Black to 81% White.

tablishing a separate school district under Wright v. Council of the City of Emporia, 407 U. S. 451 (1972), after a state imposed dual school system has been dismantled and a unitary system has been accepted and implemented as defined by Pasadena City Board of Education v. Spangler, 427 U. S. 424 (1976). The Fifth Circuit's opinion must assume, but neither the Court of Appeals nor the District Court so found, that a unitary system has not been established in Hinds County, Mississippi. In as much as the opinion of the Court of Appeals of the Fifth Circuit contains statements in direct conflict with decisions of this Court, a review and definition of the functions of Appellate Courts in school litigation appears eminently necessary.^{9/}

A unitary system is one which establishes a

^{9/} The Fifth Circuit's opinion does nothing more than reverse the District Court. In essence it orders the District Court to dissolve the CMSSD, stating that the District Court did not use the proper standards to evaluate effect although the District Court apparently did consider those standards. See Note 6 supra. None of the District Court's findings of facts were questioned. Such action by the Fifth Circuit is quite similar to "...vague dissatisfaction..." of the Fourth Circuit with the District Court's ruling in Dayton Board of Education v. Brinkman, U.S. _____, 53 L.Ed.2d 851, 97 St. Ct. 2766 (1977). Both litigants and District Courts are in need of elucidation by this Court of the proper allocation of functions between the District Courts and Courts of Appeal.

racially neutral system of student assignment. Pasadena, supra. The existence of a small number of one race or virtually one race schools within a system does not violate the constitution. Swann v. Charlotte Mecklenburg Board of Education, 402 U. S. 1 (1971). Spencer v. Kugler, 404 U. S. 1027, (1972). Dayton Board of Education v. Brinkman, U.S. ___, 53 L.Ed.2d 851, 97 S.Ct. 2766 (1977). There is no substantive constitutional right to a particular degree of racial balance of mix. Swann, supra. A unitary system is one in which racial discrimination through official action has been eliminated and students are assigned to schools on a non-racial basis. Pasadena, Swann, supra.

The Opinion of the Court of Appeals, Fifth Circuit, states that desegregation is an "...ongoing process..." and "...is often one of trial and error...", where, presumably, numerous attempts may be required to achieve desegregation and to establish a unitary system. In assuming, almost 8 years after the Court approved plan created a unitary system, that Hinds County, Mississippi, is still undergoing desegregation, the Court of Appeals apparently views desegregation as a process never-ending until all schools reflect the racial composition of the community, irrespective of the teachings of this Court in Swann, Emporia and Pasadena, supra.

The most disturbing facet of the Fifth Circuit's opinion to Petitioners, and undoubtedly other local school officials within that Court's jurisdiction, is the statement relative to the effect of annexation by the City of Jackson of part of the Hinds County

School District.^{10/} It was apparently irrelevant to the Fifth Circuit that CMSSD had absolutely no control over the expansion of the corporate limits of the City of Jackson which occurred seven years after the creation of CMSSD. Certainly any effect on Hinds County School District, and particularly any effect on the relative percentages of black to white students, caused by the annexation of some of the Hinds County territory by the City of Jackson cannot be attributed to CMSSD. Pasadena, supra.

Once a constitutionally sufficient unitary system was implemented in Hinds County, in 1970, the citizenry of the City of Clinton merely exercised rights expressly acknowledged in Emporia:

"...As already noted, our holding today does not rest upon a conclusion that the disparity in racial balance between the city and county schools resulting from separate systems would, absent any other considerations, be unacceptable. The City's creation of a separate school system was enjoined because of the effect it would have had at the time upon the effectiveness of the remedy ordered to dismantle the dual system that had long existed in the area. Once the unitary system has been established and accepted, it may

^{10/} The Fifth Circuit's opinion (App., infra, p. 30) indicates that a causal connection exists between the separate existence of the CMSSD and the effect on the racial balance of Hinds County SD created by annexation of part of Hinds County by the City of Jackson.

be that Emporia, if it still desires to do so, may establish an independent system...."
Emporia, supra at page 470.

The instant opinion of the Fifth Circuit goes beyond any logical extension of Emporia. It clearly contemplates perpetual jurisdiction of the Court to assign students on a racial basis, with the jurisdictional predicate for such assignments resting on discriminatory activities of the 1960's and before. This Court has repeatedly held that quotas are not constitutionally mandated; that a small number of one race schools does not violate the constitution; and that in the absence of segregative actions on the part of local authorities judicial intervention is not warranted. Swann, Pasadena, Brinkman, supra.

The opinion of the Court of Appeals ignores the interdistrict ramifications of its decision, although neither the CMSSD nor Hinds County have been accused of racially discriminatory acts. When read in light of Milliken v. Bradley, 418 U. S. 717 (1974), and applied to the facts of this case, Emporia requires a finding of segregative action to support an interdistrict remedy. Emporia expressly acknowledged that local control was a relative factor entitled to consideration. This factor was apparently overlooked or ignored by the Fifth Circuit. Citing Emporia, along with Milliken and San Antonio School District v. Rodriguez, 411 U. S. 1 (1973), this Court recently reaffirmed its position in Brinkman, supra that local autonomy of school districts is a vital national tradition; and, for that reason local control should be removed only upon proof of a constitu-

tional violation.

Resolution of the questions presented is of vital importance to local officials charged with the difficult task of providing quality education to the school children of this nation. Many of these officials reside in communities where racial discrimination in some form was found to exist in the past and which communities have undergone Court imposed remedies to correct the same. As demographic change resulting from migration within this nation continues, local officials are required to meet administrative and fiscal responsibilities in providing education. Should these officials be guilty of segregative activities, and upon a proper showing, the Courts can and should intervene.

As in the instant case where school officials are not charged with segregative constitutional violations, there is no basis for judicial intervention. Swann, Pasadena, supra. Petitioners do not discount the importance of maintaining equal educational opportunities for all children. They recognize and practice compliance with the constitutional requirement to eliminate racial discrimination and establish unitary school systems. However, in Hinds County, Mississippi, and particularly in CMSSD, this was accomplished almost eight (8) years ago. A unitary system where no child is assigned to a school on the basis of that child's race has been in effect from and since the implementation of the Court approved HEW desegregation plan in January, 1970.

The opinion of the Court of Appeals clearly indicates that it assumes jurisdiction to perpetually

reassign students in school districts located in that Circuit on the basis of race. Such a position misconceives the constitutional concept of a unitary system. It fails to recognize the limits of judicial authority. It fails to follow the precedents of this Court.

CONCLUSION

For the reasons stated above, the petition for certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF MISSISSIPPI
JACKSON DIVISION

UNITED STATES OF AMERICA
VS CIVIL ACTION NO. 4075(J)
HINDS COUNTY SCHOOL BOARD, ET AL

OPINION

On November 7, 1969, the Fifth Circuit Court of Appeals, following the decision in Alexander v. Holmes County Board of Education, 1969, 396 U.S. 19, directed 30 school districts in the Southern District of Mississippi to implement permanent plans devised by the Office of Education, Department of Health, Education and Welfare, as they pertained to student and faculty assignments, effective December 31, 1969. 423 f.2d 1269. The Appellate Court retained jurisdiction, under its docket Nos. 28030 and 28042, to insure the prompt and faithful compliance with its order, with any suggested modifications to be heard by this Court for the purpose of making findings of fact with respect thereto, and submitting its recommendation or disapproval to the Appellate Court for its review.

In an order dated February 25, 1970, with respect to the Hinds County school district, on the docket of this Court as United States of America v. Hinds County School Board, et al., Civil Action No. 4075(J), the Appellate Court reviewed all orders it had entered pertaining to this school district, including an order of December 5, 1969, denying defendants' motion to modify the plan with regard to faculty assignment, and on June 30, 1970, an order disallowing interrogatories filed by amicus

curiae (NAACP Legal Defense and Educational Fund, Inc.). The Appellate Court noted that two motions namely, (1) the motion of amicus curiae to dissolve the Clinton Municipal Separate School District, herein called Clinton MSSD, and for a new plan of student assignment, filed on September 27, 1972, and referred to the District Court on October 16, 1972 for findings of fact and recommendations, and (2) the motion of amicus curiae for leave to intervene in this action as a party plaintiff filed on February 9, 1973, were still pending, and inasmuch as the creation of the Clinton MSSD had never received judicial approval, transferred jurisdiction of the case to this Court to hear the pending motions within 90 days of the entry of its Order. The Order also provided for the discontinuance of reports required by United States v. Hinds County School Board, 433 F.2d 618-19, in the event HEW Summary Reports (Forms 101 and 102), along with a report showing faculty and staff assignments as required by Hinds County if such is not reflected in the HEW Summary Reports, are filed with the district court and served on counsel for the plaintiff and amicus curiae, and are retained by the district court for two years, or alternatively, the defendant school district may continue to file its Hinds County type of report annually, not later than November 15 of each year.

On April 26, 1976, the Appellate Court issued a supplemental order to include that in the event the district court determined that amicus curiae had authority to file and litigate its pending motion to dissolve the Clinton MSSD and for a new plan of pupil assignment, then the district court was directed to hear the motion within 90 days of February 25, 1976; and if the district court should determine that amicus curiae did not have authority to file

and litigate its motion, any subsequent similar motion filed by proposed private plaintiff intervenors, if their motion is granted, or by the United States shall be heard within 60 days of the date upon which such motion is filed with the district court.

Between January and June 1970, at the time the desegregation plan for the Hinds County school district, consisting of seven zones, with schools covering grades 1 to 12 in each zone, was in effect and being implemented, over which jurisdiction was retained by the Appellate Court, the Clinton MSSD was formed with district lines coterminous with the zone lines of the Clinton Attendance Zone in the Hinds County school district. For the record the Court notes that on November 30, 1970, the Clinton MSSD filed a motion with the Appellate Court for recognition as a separate school district, the motion containing allegations that all pertinent resolutions, an ordinance of the City of Clinton, approval by the Mississippi State Educational Finance Commission, student and faculty assignments, school district map, and descriptive boundary lines, copies being attached to the motion had been forwarded in July 1970 to HEW and the Department of Justice. Although a copy of this motion was filed in the district court and copies served on plaintiff and amicus curiae, unknown to this Court until the hearing hereon, was the fact that the motion of the Clinton MSSD was not heard by the Appellate Court nor filed by its Clerk. This Court also notes that following the motion of amicus curiae filed on September 27, 1972 with the Appellate Court, but noticed for a hearing before the district court on October 10, 1972, seven days before the motion was referred to the district court, the United States, as plaintiff, on December 4, 1972, filed its response to the motion of

amicus curiae with the Appellate Court in which it said: "If the desegregation of the one race schools can be accomplished without participation of the Clinton Municipal Separate School District, the existence of that district may continue unchanged. However, if it is determined that the creation of the Clinton District was to defeat desegregation, the Clinton District can be required to participate to the extent necessary in further desegregation." On February 8, 1973, the United States noticed the depositions of Hinds County school district officials to be taken, with various records to be brought to the depositions. This notice was filed with the Appellate Court.

On April 5, 1976, after jurisdiction was transferred here, the United States filed a motion in this Court to add as parties defendant the Clinton MSSD, its superintendent and board of trustees, the City of Clinton, and the State Educational Finance Commission. In this motion the government asserted that four black students, presumably in the Hinds County school district, represented by their parents, had, on February 9, 1973, filed a motion to intervene as parties plaintiff with the Appellate Court. Such a motion is not in the record before this Court, nor has this Court seen it or a copy.

On April 23, 1976, the United States filed a motion for supplemental relief with this Court asking this Court to enjoin the continued operation of the Clinton MSSD as a school system independent of the Hinds County school district and for an order directing the Hinds County School Board to develop and implement a plan of desegregation for the 1976-77 school year which meets the requirements in Swann v. Charlotte Mecklenburg Board of Education, 402 U.S. 1.

On May 13, 1976, a consent decree was entered into whereby the Clinton MSSD, its superintendent and board of trustees, the City of Clinton, and the State Educational Finance Commission agreed to their joinder as parties defendant. All defendants have since responded to the government's motion for supplemental relief.

On May 14, 1976, the four black students, who allegedly filed a motion in the Appellate Court to intervene as parties plaintiff, filed an amended motion in this Court. These students attend the Bolton Attendance Center in the Raymond Attendance Zone in the Hinds County school district.

On notice to all parties, including attorneys for amicus curiae and the black students, the attorneys being the same for both, this case was set for hearing on May 19, 1976 on all motions, and heard that day.

The motions before the Court were (1) the motions of NAACP (a) to participate as a party-plaintiff, (b) and to dissolve the Clinton MSSD and for a new plan of student assignment transferred to this Court under the order of the Appellate Court of February 25, 1976; (2) the amended motion of the four black students to intervene as party-plaintiffs; and (3) the government's motion for supplemental relief filed pursuant to the Appellate Court's amended order of April 26, 1976, seeking to enjoin the continued operation of the Clinton MSSD and to require the Hinds County School Board to develop a new plan of desegregation.

At the hearing, the Court granted the motion of NAACP Legal Defense and Educational Fund, Inc., as amicus curiae, to participate in all phases of the hearing and denied the amended motion of the black students attending the Bolton Attendance Center

to intervene as parties-plaintiff. Counsel for the NAACP announced that it was adopting that part of the government's motion to dissolve the Clinton MSSD and agreed with the government not to proceed on a new student assignment for the Hinds County school district at this hearing. The government's position was that if the Court refused to enjoin the operation of the Clinton MSSD, the government would prefer to await a final decision of the Mississippi Supreme Court on a case before it involving the attempt by the City of Jackson to annex an area including parts of both the Clinton MSSD and the Hinds County school district before proceeding with the matter of a new student assignment plan for the Hinds County school district. The position of counsel for the Hinds County school district was that if the Court dissolved the Clinton MSSD, it would need further time to respond to any proposed new student assignment plan, and, if the Court did not dissolve the Clinton MSSD, it would have to await resolution of the Jackson annexation case before considering a new student assignment plan. The Court also granted the Clinton MSSD and the City of Clinton the right to respond to the motion of the NAACP to dissolve the MSSD and for a new student assignment plan, which response has been filed since the hearing.

On the agreement of all parties the hearing was limited to the motion of the government and the NAACP to dissolve the Clinton MSSD, at the conclusion of which the Court reserved ruling in order to study the voluminous documentary evidence offered and post-trial briefs.

In the government's motion for supplemental relief, adopted by the NAACP, the government charges that the purpose and effect of the creation of the Clinton Municipal Separate School District

was to impede the desegregation of the Hinds County school district and to thwart the establishment of a unitary school system in Hinds County in that, (a) the Clinton MSSD began operation in the 1970-71 school year as an 85% white school system immediately adjacent to four all-black or virtually all-black schools in Hinds County and currently serves a student population of over 80% white while the four adjacent Hinds County schools remain all-black or virtually so; (b) it eliminated the possibility of black students from Hinds County attending Clinton schools under the county school system's majority to minority transfer plan; and (c) it established a lower black to white faculty ratio in the municipal district than in the Hinds County district.

As the government notes the HEW plan which the Hinds County school district was directed to adopt and implement, the student assignment plan being effective as of the opening of schools in September 1970, created seven geographic attendance zones in Hinds County, each served by one high school, including a Clinton Attendance Zone that encompassed not only the corporate boundaries of the City of Clinton, but surrounding territory. Beginning on January 5, 1970, the local Clinton Board of Education passed a resolution urging the creation of a separate Clinton school district.^{1/} This resolution urged the adoption of a school district, the boundaries of which would be identical to those of the Clinton Attendance Center, in the plan offered by HEW, and which was directed to be adopted and implemented by the Fifth Circuit Court of Appeals.

^{1/} This local board, under the dual school system, had been appointed by the Hinds County School Board and exercised such authority as was delegated to it by the Hinds County School Board.

In successive steps, the Clinton Board of Aldermen passed a resolution creating a separate municipal school district to be coterminous with the Clinton Attendance Zone, enabling legislation was passed by the Mississippi Legislature by virtue of Senate Bill No. 2293, amending Section 6411-01, Mississippi Code of 1942, now Section 37-7-637, Mississippi Code of 1972, which was approved by the Governor, and the new district received approval on May 18, 1970 from the Mississippi State Educational Finance Commission, which also approved a minor correction in the boundary description on June 15, 1970. The Hinds County School Board, which had initially declined to approve the new school district, did, on May 14, 1970, approve same "insofar as this Board is authorized to do." The Clinton MSSD began operation on July 1, 1970. On December 2, 1970, the newly created school district, in an attempted compliance with reporting requirements of the Fifth Circuit Court of Appeals in all school re-districting plans over which it retained jurisdiction, not only filed such a report with the Appellate Court, but two days prior thereto, on November 30, 1970 forwarded its motion to the Appellate Court to sever the Clinton MSSD from the Hinds County school district and to recognize the Clinton MSSD as a separate school entity. Copies of the motion were mailed to HEW, the Department of Justice, amicus curiae, and this Court. This is the motion that the Clerk of the Appellate Court declined to file.

The essence of this motion is that, as the result of U. S. Census reports and an independent report by planning consultants employed by the City of Clinton to develop a comprehensive plan to aid in the orderly development of the city and to establish its ability to provide municipal services for its

phenomenal population growth, the city recognized the problem of providing school facilities for students residing within its area and the area of the Clinton Attendance Zone, now Clinton MSSD.^{2/} Between 1958 and 1970, three schools were built in the Clinton Attendance Zone, namely, Clinton Park Elementary, Northside Elementary, and Clinton High School. The Clinton Junior High School, now Clinton Elementary, was not ready for occupancy prior to September 1970.^{3/} It was built following the passage of a bond issue by the citizenry of the entire Hinds County school district, after three earlier proposed bond issues had failed. This school initially opened with 80% occupancy. Movants believed additional facilities would be required. In recognition of its growth and corresponding duty to provide adequate school facilities the City determined to create its own school district, not confined to the four square mile area within the municipal corporate limits, but to include the additional twenty square mile area of the Clinton Attendance Zone as formulated by HEW in its dismantling of the former dual school system existing in the Hinds County school district and as directed by the Appellate Court.

From 1970 until February 1976, when the Appellate Court returned jurisdiction of the Hinds County school district case to this Court with directions to hear and resolve the issue of whether or not the Clinton MSSD should be dissolved and to require

^{2/} U. S. Census for the City of Clinton was 916 persons in 1940; 2,255 in 1950; 3,438 in 1960; and 7,525 in 1970, with a growth of 114% during the period 1960-1970. Projections for the future are 18,551 in 1980 and 30,182 in 1985, with a present population of 13,000; these figures appearing in the affidavit of Charles G. Blass, current Mayor of Clinton.

^{3/} Eastside Elementary, housing grades 5-6, has since been built with occupancy beginning in the 1973-74 school year.

a new student assignment plan for the Hinds County school district, the Clinton MSSD has for over six years continued to operate as a racially desegregated separate municipal school district, filing reports with the Appellate Court in the time and manner as required of the Hinds County school district. At all times during this over six-year period, the Clinton MSSD has kept all parties advised of its status, inviting visits from HEW and Department of Justice personnel.

In its motion, not filed nor heard by the Appellate Court during the six years that Court retained jurisdiction, the Clinton MSSD recognized that it was obligated to determine the effect its separation from the Hinds County school system had on the balance of the Hinds County school district inasmuch as its schools, from the beginning had a majority white attendance, whereas in the total student attendance in the Hinds County school district, blacks predominated over white. To show that this effect was but minimal at the most, the motion contained the following facts and statistics:

A new subdivision in the northeast corner of the district will infuse approximately 200 new families, all black, into the district. Not including the students zoned into the Clinton Attendance Zone, 13 black and 25 white new students enrolled in the Clinton MSSD in 1970 after their families relocated into the municipal district. In addition, 4 black and 9 white students, who resided in the Clinton Attendance Zone but were enrolled in other schools in Hinds County in 1969-70 in special education classes, enrolled in the municipal district in 1970 for special education not previously available in the Clinton Attendance Zone. Previously attending Hinds County schools other than Clinton in 1969-70, 146 white students were zoned into the Clinton Attend-

ance Zone for the year 1970-71 in the HEW plan. This figure included 19 enrolled in the first grade not previously enrolled in any school. Leaving the Clinton Attendance Zone in 1969-70, were 53 whites who returned to Clinton schools and physically reside in the Clinton MSSD. The motion reflected that as shown in the Clinton MSSD December 1, 1970 status report to the Appellate Court there were 2715 students in attendance in the Clinton MSSD, 2298 white and 417 black, uniformly enrolled in approximately the same percentage throughout all the district's schools and grades. In May 1970, 2431 students were enrolled in the Clinton Attendance Zone, with a net gain in December 1970 of 273 students, 250 of whom were enumerated in the above statistics, reflecting a net gain of 23 students other than the 53 whites who have moved back into the district. In actuality movants stated that as of December 30, 1970, there were 358 new students in the district, not enumerated above; at the same time 335 students moved out of the district and were not enrolled in the Clinton MSSD. Other than the students zoned into the Clinton Attendance Zone by HEW and the Appellate Court which directed the implementation of the HEW plan, movants reported that the only effect on the remainder of the Hinds County school system was that 38 students who formerly attended schools in the Hinds County school district and who did not live in Clinton, attended the Clinton MSSD in 1970, these 38 students being only .003% of the total of 13,036 students enrolled in the Hinds County school district as of April 1970.

By way of summation, the Clinton MSSD, in its motion which it tried to file in November 1970, contended that, inasmuch as the creation of the new

school district with boundaries identical to that of the Clinton Attendance Zone, had not materially nor adversely affected the desegregation plan of the Hinds County school district, and inasmuch as the Clinton MSSD was being operated in a totally, desegregated, unitary manner and upon a racially non-discriminatory manner, and because of the explosive population growth within the Clinton MSSD, it was vital to the citizens of that area to have within their power the ability to finance the construction of needed new buildings and the operation and maintenance of existing facilities without having to rely upon the remainder of the Hinds County school district for the passage of bond issues.

It was not until September 1972, that amicus curiae, who had not been authorized by the Appellate Court to participate in pleadings, filed its motion with the Appellate Court to dissolve the Clinton MSSD, erroneously noticed for a hearing before the District Court before the motion was referred to the District Court for resolution, and it was not until December 1972 that the government filed with the Appellate Court its response to the motion of amicus curiae, at which time the government took the equivocal position noted above.

During the period of 1970 to 1976, the Clinton MSSD has assumed its portion of the Hinds County school district's bonded indebtedness, has activated its own school district tax assessment procedures, has successfully passed a second \$1,500,000.00 bond issue of its own with a new school building under construction to meet the requirements of its expected population growth which has proved to be accurate, has maintained and operated its schools for a total expenditure of approximately \$8,000,000.00 during

the six-year period,^{4/} and has continued its schools on an integrated basis with courses and services not before available to it, and with an increase of black students over the increase of white students.

The government, joined in by amicus curiae, seeks to undo all this by its motion of April 23, 1976, and its subsequent motion to add the Clinton MSSD, its superintendent and board of trustees, the City of Clinton, and the Mississippi State Educational Finance Commission as additional parties defendant.

The government, by way of its post-trial brief, none having been filed by amicus curiae, and in the wealth of documentary evidence offered by the government at the hearing, contends that in September 1969, prior to the establishment of the Clinton MSSD whose students first attended schools in this district in September 1970, the Hinds County school district had an enrollment of 14,211 students, 53% of whom were black. When the separate Clinton system began operation in the fall of 1970, it served 2,715 students, 15% of whom were black, while the Hinds County public school enrollment as a consequence became 66% black. Based on fall 1975 figures reported from the two districts (1) enrollment in the Clinton MSSD totals over 4,200, about 19% black; (2) the Hinds County public school enrollment is 58% black; (3) the latter district enrolls approximately 88% of the black students living in the two districts; and (4) together, the two districts in the 1975-76 school year enrolled 14,682 students, 47% of whom are black. The government contends that

^{4/} Capital improvements during the years 1970-76 total \$2,918,976.00. In the deposition of Virgil F. Belue, Superintendent, taken in September 1973, he testified that the budget of the Clinton MSSD in 1972 was \$1,250,000.00, and in 1973 was \$1,500,000.00.

the formation of the Clinton MSSD created and remains today a "white island" in the midst of two majority black school systems, Hinds County and the City of Jackson on the east.

Geographically, the government has shown that Sumner Hill High School, in the Sumner Hill Attendance Zone, north of the Clinton MSSD, serving grades 7-12, all black, is approximately two miles by road from both Clinton High School, grades 9-12, and Clinton Junior High School, grades 7-8. Hinds County's Lovett Elementary, also in the Sumner Hill Attendance Zone, serving grades 1-6, with 2 whites out of a total current enrollment of 558 students, is 3.5 miles from Clinton Park Elementary, grades 1-2, and Northside Elementary, grades 3-4, both in the Clinton MSSD. From Lovett Elementary to Eastside Elementary, grades 5-6, in the Clinton MSSD, the distance is about 5 miles. Also West Side Elementary, in the Forest Hill Attendance Zone, serving grades 1-9, is within 4 miles of the three elementary schools in the Clinton MSSD.

As to physical plants most of the schools in the Clinton MSSD have been built since those in the Hinds County system and are in better condition than Sumner Hill High School and West Side Elementary.

Under the dual school system, that is, prior to the implementation of the HEW plan assigning students to zones, black students, living in what is now the Clinton MSSD, attended Sumner Hill, Lovett and West Side schools in the Hinds County school system; white students living north of the City of Clinton in what is now the Sumner Hill Attendance Zone, attended schools now located within the Clinton MSSD. The county provided transportation to those students who were eligible for it under

the provisions of state law. During the first year of operation of the Clinton MSSD, it contracted with the Hinds County school district to furnish transportation for all eligible students in the new district. Currently, the Hinds County school district provides transportation to approximately 85% of the students attending Lovett and Sumner Hill, over 1020 out of the 1236 students enrolled at the two schools. The routes which serve them range in one-way distance from 11 to 35 miles. The Clinton MSSD presently provides or contracts for transportation for over 1650 of its students, who live not less than one mile from their assigned school, nearly 40% of its enrollment, and contracts with a private firm for transportation for an additional number of students who live within the Clinton MSSD. Because bus transportation was used formerly to transport students to segregated schools, and is now used by both school systems, the government says any objection to busing now is of little merit.

Further, the government has shown through its documentary and disposition evidence that the establishment of the Clinton MSSD has eliminated the majority to minority transfer provision of the Hinds County school desegregation plan insofar as it related to the Clinton Attendance Zone. The policy of the Clinton MSSD, since its establishment has been not to accept such transfers from without the district except to allow prior transferees to continue as long as they furnished their own transportation.

Finally, the government has shown that the formation of the Clinton MSSD has resulted in a lower black-white teacher ratio in that district than for the remainder of the Hinds County school district. In April 1970, 42% of the classroom teachers assigned to the Clinton Attendance Zone were black.

After the Clinton MSSD began its operation in the fall of 1970, it employed 106 full-time classroom teachers, 31% of them being black, while the ratio in the balance of Hinds County school system was 54% black. Currently the Clinton MSSD employs 200 teachers, 39 of whom, or 19.5% are black, while the Hinds County school system's faculty is 45% black.

The government's argument for enjoining the continued operation of the Clinton MSSD is that this new district was carved out of the Hinds County school district at a time when the Hinds County school district had not completed the dismantling of a system of enforced racial segregation, the issue being controlled by the decisions in Wright v. Council of the City of Emporia, 407 U.S. 451 (1972), and United States v. Scotland Neck City Board of Education, 407 U.S. 484 (1972). Although the expressed motive of the City of Clinton officials responsible for the creation of the new school district was to meet the needs of its growing population and to furnish a better public school system of education with more likelihood of the passage of necessary bond issues for its own needs, the government not only questions this motive, inasmuch as the new district was formed coincidentally with the implementation of the desegregation plan for the Hinds County school district, thereby insuring for the Clinton MSSD a majority white student attendance, but relies on the two above cited cases which hold that motive is not the test, the critical factor being the effect that the carving out of a new district has on the remaining part of the system being dismantled. In Wright, following a court ordered desegregation plan for Greenville County, Virginia in June 1969, the City of Emporia, lying near the center of the county and whose schools were a part of the

county schools, undertook to create a new school district coterminous with its corporate boundaries. There were 3,759 students enrolled in the unitary system contemplated by the desegregation order of whom 66% were black and 34% white. Had Emporia been permitted to establish its separate school system, 1,123 of the county-wide students would have attended the city schools, increasing the white percentage in those schools to 48%. It was undisputed that the city schools would be operated on a unitary basis. Throughout the month of July 1969, the city continued necessary procedures toward implementing the separate system. On August 1, 1969, the petitioners who had been instrumental in securing the county-wide desegregation plan, filed a supplemental petition, adding city and school officials of Emporia as additional defendants seeking to enjoin the withdrawal of Emporia students from the county schools. The District Court, on August 8, 1970 found that the establishment of a separate school system by the city would constitute an impermissible interference and frustration of its desegregation order for the county schools and issued a preliminary injunction enjoining the defendants from taking any action which would interfere in any manner with its desegregation order, making this injunction permanent. The Appellate Court, reversed finding that the issue rested on the "dominant purpose of the boundary realignment", and finding further that Emporia's primary purpose was "benign" and not a cover-up for racial discrimination. The Supreme Court reversed the Appellate Court, re-instating the District Court's injunction on the basis that, in addition to the disparity in racial percentages, the proportion of whites in the county schools might drop as county-school whites shifted to private academies, while some whites might

return to city schools from the academies they previously attended; that two formally all-white schools, better equipped and better located than county schools, were in Emporia, while all the schools in the surrounding county were formerly all black; and that Emporia, which long had the right to establish a separate school system, did not decide to do so until the court's order prevented the county from continuing its long-maintained segregated system, this last reason given despite the court's focus upon effect rather than motivation. This court also notes that, as to the disparity in racial percentages, the Supreme Court cited from its earlier decision in Swann v. Mecklenburg Board of Education, 402 U. S. 1 (1971) that "[t]he constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."

In U. S. v. Scotland Neck City Board of Education, *supra*, the City of Scotland Neck, N.C., part of the larger Halifax County school district, then in the process of dismantling its dual school system, undertook by virtue of a state statute enacted in March 1969, authorizing the creation of new school districts, to form its own. The United States, prior to any court-ordered desegregation for the county-wide schools, in June 1969, filed suit to desegregate the county schools and to enjoin implementation of the statute by the city. The district court enjoined the statute as creating a refuge for white students and promoting school segregation in the county. The Appellate Court reversed, finding that the statute's impact on desegregation of the county's dual system was minimal, and should not be regarded as an alternative desegregation plan for the county since the statute was enacted by the legis-

lature and not by the county school board. The Supreme Court, in turn, reversed the Appellate Court holding it unmaterial whether the legislature or the school board initiated the action. In the 1968-69 school year, 10,655 students attended the county schools, 77% being black, 22% white, and 1% American Indian. The effect of the state statute allowing Halifax County to carve out a new district for the Scotland Neck schools would have given a new unit with 695 students, 57% white and 43% black. Under a transfer plan devised by the Scotland Neck City Board of Education, 360 students of whom only 10 were black, residing outside the city limits, applied to transfer into the city schools, while 44, all black, applied to transfer out of the city to a nearby school in the Halifax County school system. The projected enrollment for the county schools was 2,948 students, of whom 78% were black. Had the statute been implemented by the Scotland Neck schools, while its enrollment would have been 57% white, the schools remaining in the county would have been 89% black. In referring to its decision of the same day in Emporia, the Supreme Court said: "We have today held that any attempt by state or local officials to carve out a new school district from an existing district that is in the process of dismantling a dual school system 'must be judged according to whether it hinders or furthers the process of school desegregation: If the proposal would impede the dismantling of a dual system, then a district court, in the exercise of its remedial discretion, may enjoin it from being carried out.' " (Underscoring added). At the same time the Supreme Court emphasized its language in Swann that the district judges or school authorities "should make every effort to achieve the greatest possible degree of actual desegregation."

The Hinds County school board has made no formal response to the government's motion to dissolve the Clinton MSSD, having, perhaps reluctantly, agreed to its creation. The Clinton city and school officials protest that neither the Emporia nor Scotland Neck holdings are controlling here, basically for two reasons: (1) the Clinton MSSD boundary lines are exactly those of the Clinton Attendance Center lines established in the HEW plan and approved by the Appellate Court, the projected attendance for this zone in 1970-71, as one of seven attendance zones in the county, being in the same white to black proportion as the actual attendance while operated as the Clinton MSSD, except for the 38 students, referred to above,^{5/} who formerly attended schools in the Hinds County school district and attended the Clinton MSSD in 1970; in other words, had not the Clinton MSSD been created, the same majority of white students would have attended the Clinton Attendance Center; and (2) the United States had unconscionably waited six years to seek dissolution of the Clinton MSSD after both HEW and the Department of Justice were given direct notice and knowledge of the existence of the Clinton MSSD at the time it was created.

The Court is aware of language in Stout v. Jefferson County Board of Education, 448 F.2d 403, 404 (1971), in which the Fifth Circuit Court of Appeals, as a forerunner to the Emporia and Scotland Neck decisions, said:

"Likewise, where the formulation of splinter

^{5/} According to the HEW projected attendance for 1970-71, 1909 whites and 332 blacks were assigned to schools in the Clinton Attendance Center Zone. The actual attendance as of November 11, 1970 in the Clinton MSSD consisted of 2,298 whites and 417 blacks, an increase percentage wise of black attendance.

school districts, albeit validly created under state law, have the effect of thwarting the implementation of an unitary school system, the district court may not, consistent with the teachings of Swann v. Charlotte-Mecklenburg, *supra*, recognize their creation."

Hinds County, in comparison with other counties in Mississippi, is the second largest county covering 877 square miles. Its boundaries are those of the

Actual Attendance - 11/19/70

Schools	Grades	W	B	T
Utica	7-12	110	361	471
Mixon	1-6	64	721	785
Terry	7-12	62	284	346
Perryman	1-6	18	423	441
Byram	1-12	568	227	795
Forest Hill	7-12	1060	283	1343
West Side	1-9	41	938	979
Van Winkle	1-6	211	79	290
Timberlawn	1-6	316	48	364
Oak Forest	1-6	518	0	518
Woodville	1-6	242	27	269
Sumner Hill	7-12	0	574	574
Lovett	1-6	0	662	662
Raymond	9-12	101	150	251
Carver	1-8	86	565	651
Edwards Att. Ctr.	1-9	0	788	788
Bolton	1-9	10	616	626
Clinton Hi.	9-12	675	112	787
Clinton Jr. Hi.	5-8	821	152	973
Northside	3-4	413	78	491
Clinton Park	1-2	389	75	464

Actual Attendance - 12/19/75

Schools	Grades	W	B	T
Utica	7-12	86	483	569
Mixon	1-6	51	533	584
Terry	7-12	54	368	422
Perryman	1-6	44	340	384
Byram	1-12	798	220	1018
Forest Hill	7-12	1585	279	1864
West Side	1-9	19	655	674
Van Winkle	1-6	193	198	391
Timberlawn	1-6	398	42	440
Oak Forest	1-6	503	0	503
Woodville	1-6	414	34	448
Sumner Hill	7-12	0	652	652
Lovett	1-6	2	554	556
Raymond	9-12	112	195	307
Carver	1-8	138	426	564
Edwards Att. Ctr.	1-9	14	667	681
Bolton	1-9	0	383	383
Clinton Hi.	9-12	1080	161	1241
Clinton Jr. Hi.	7-8	673	159	832
Eastside	5-6	592	167	759
Northside	3-4	523	134	657
Clinton Park	1-2	577	176	753

county school district except for a portion on the east side situated in the City of Jackson, leaving 792 square miles in the school district. Under the court-ordered desegregation plan in 1970, students were assigned to seven attendance zones, irregularly shaped, primarily to insure that there be at least one high school in each zone. These zones, including the Clinton MSSD, with grade assignments and attendance as of November 1970 and as of December 1975,

are shown below. The Utica Agricultural High School, located in the Utica Zone, is not operated by the Hinds County school district, but is under a junior college board of trustees. It is attended by black students in grades 10-12 throughout the district, although the other zones each has a high school servicing these two grades.

In the Byram Attendance Center Zone, with one school serving grades 1-12, there is a white majority attendance. In the Forest Hill Attendance Center Zone, Oak Forest Elementary has an all white attendance, and the remaining schools are majority white, except for West Side Elementary and Van Winkle Elementary which have a majority black attendance. In the Raymond Attendance Center Zone, all schools are majority black with one, Edwards Attendance Center, being all black. In the Sumner Hill Attendance School Center, Bolton and Sumner Hill are all black, with Edwards and Lovett being predominantly black. In the Terry Attendance Center Zone, both Perryman and Terry High School are predominantly black. In the Utica Attendance Center Zone, Mixon Elementary and Utica High School are majority black, and Utica Agricultural High School is all black. In the Clinton MSSD, all of the schools have a majority white attendance but with a more uniform percentage of black attendance than in any of the four zones of the Hinds County school district with black majorities. Thus in the seven zones, three were and are predominantly white and four predominantly black.

These characteristics have not changed except to the extent that the white and black attendance in the Clinton MSSD has increased, the black attendance in the Clinton MSSD has increased, the black attendance having increased at a greater rate than

the white. The Court accordingly finds that the establishment of the Clinton MSSD has had little disparate effect on the balance of the Hinds County District, except for eliminating the majority to minority feature of the original Court enforced plan. The extent of this elimination in numbers of students would be purely conjectural. Historically, the number of such transfers in other southern Mississippi school districts has been minimal.

Should this Court dissolve the Clinton MSSD and return it to its former status, any new plan for student assignment which would propose to pair its schools with others of other zones, such as with the Sumner Hill High School and Lovett Elementary in the Sumner Hill Attendance Center Zone, and with the West Side Elementary School in the Forest Hill Attendance Center Zone, would require geographical changes in the zones and massive bussing of 40 miles or more one way.

Both the government and the Hinds County School Board have declined to offer a new plan in view of the City of Jackson's recent annexation of forty square miles of additional territory,^{6/} now before the U. S. Supreme Court, which includes Forest Hill High School, Oak Forest Elementary, Timberlawn Elementary, Van Winkle Elementary, West Side Attendance Center, and Woodville Heights Elementary, and would affect the attendance at the Byram Attendance Center, all in the Hinds County school district, exclusive of the Clinton MSSD. According to an exhibit in evidence, 4,470 students are included

in the proposed expansion with a racial composition of 29% black and 70% white. It is projected that the students remaining in the Hinds County school district, will consist of 6,692 students, 82% black and 18% white.

The Supreme Court noted in Wright that petitioners, in seeking to prevent a new district, filed their petition promptly, as did the United States in attacking the state statute in Scotland Neck. Neither new district functioned as such. This Court recognizes that in school cases the plea of estoppel, laches, or waiver should not be interposed when any such plea would have the effect of perpetuating constitutional deprivations. Here, however the Clinton MSSD has operated for six years without court intervention. Its dissolution now would create multiple problems for the community. More importantly, this Court finds that any new desegregation plan, if offered by the Hinds County School District, the United States, or amicus curiae, if the Clinton MSSD were dissolved, would not result in any better racial balance than now exists short of drawing newer and larger zones with a concomitant increase in the number of students to be bused over longer distances than now prevail.

Accordingly, the Court concludes that in its "remedial discretion", it would be unjust to dissolve the Clinton MSSD after its establishment for a period of over six years in order to give objecting parties the opportunity to offer a new assignment plan on the assumption that such a plan might work better than that offered by HEW and approved by the Appellate Court; the Court, therefore, declines to order that the Clinton MSSD be dissolved.

^{6/}This annexation has been upheld by the Mississippi Supreme Court. However, the Court is informed that the matter is either on appeal to the United States Supreme Court and/or before the Attorney General of the United States, by virtue of 42 USCA #1973(c).

An order to this effect may be submitted within the time allowed by the local rules.

Dan M. Russell, Jr.

UNITED STATES DISTRICT JUDGE

DATE: November 12, 1976

UNITED STATES of America,
Plaintiff-Appellant,
v.

HINDS COUNTY SCHOOL BOARD
et al., Defendants,

Clinton Municipal Separate School
District, Defendants-Appellees.
No. 76-4436.

United States Court of Appeals,
Fifth Circuit.

Sept. 26, 1977.

United States brought action seeking injunctive relief to dissolve one school district and remerge it into another school district. United States District Court for the Southern District of Mississippi, Dan M. Russell, Jr., J., denied relief, and United States appealed. The Court of Appeals held that in attempting to determine effect of school district's separation from another school district, district court erred when it measured effect by noting that boundaries by separated school district were the same as zone boundaries previously drawn by Department of Health, Education and Welfare; cause would be remanded to permit district court to consider whether school district, by creating separate school district with permanent boundaries and establishing barrier that prevented schools from being part of the majority-to-minority transfer program hindered the process of school desegregation.

Vacated and remanded.

1. Schools and School Districts 13

In determining whether realign-

ment of school districts is discriminatory, courts must evaluate the effects of the action upon the dismantling of the dual school systems involved.

2. Schools and School Districts 13

Process of desegregation of schools is not a static process of lines and markers once set being fixed for all time, but instead, the process is often one of trial and error; if one set of zones proves ineffective then another must be drawn, and if necessary, another, or some yet different approach be tried.

3. Schools and School Districts 13

In attempting to determine effect of school district's separation from another school district, district court erred when it measured effect by noting that boundaries adopted by separated school district were the same as zone boundaries previously drawn by Department of Health, Education and Welfare; cause would be remanded to permit district court to consider whether school district, by creating separate school district with permanent boundaries and establishing barrier that prevented schools from being part of the majority-to-minority transfer program hindered the process of school desegregation.

Robert E. Hauberg, U. S. Atty., Jackson, Miss., Walter W. Barnett, Atty., Appellate Section, Civil Rights Div., Dept. of Justice, Mark Gross, Atty., Dept. of Justice, Burtis M. Dougherty, Jr., Atty., Education Section, Civil Rights Div., Dept. of Justice, Washington, D. C., for plaintiff-appellant.

Robert C. Cannada, John M. Putnam, Jackson, Miss., for Hinds County School Bd.

John H. Fox, III, Jackson, Miss., for Clinton Municipal Separate School Dist. & City of Clinton.

Peter M. Stockett, Jr., Jackson, Miss., for State Ed. Finance Comm.

Walter R. Bridgforth, Yazoo City, Miss., Melvyn Leventhal, Fred L. Banks, Jr., Jackson, Miss., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Mississippi.

Before THORNBERRY, MORGAN, and CLARK, Circuit Judges.

BY THE COURT:

The United States sought injunctive relief to dissolve the Clinton Municipal Separate School District (Clinton MSSD) and remerge it into the Hinds County School District (Hinds County SD). This appeal comes from an order of the district court denying that relief. In reaching its decision the district court did not use the proper standards to evaluate the effect of the independent existence of the Clinton MSSD on the ongoing process of dismantling the dual school system in Hinds County. For that reason we vacate the district court's order and remand for further consideration:

The Clinton MSSD was formed in 1970; before then it had been part of the Hinds County SD. Within the Hinds County SD there were several local school districts, known as attendance centers, each of which had a board of trustees appointed by the Hinds County School Board which delegated varying amounts of authority to the local boards. Although alterations had been made previously, after 1949 the Clinton Attendance Center

comprised the present area of the Clinton MSSD, an additional area of the Hinds County SD that today is known as the Sumner Hill Attendance Zone, and areas that have been incorporated into the City of Jackson Municipal Separate School District on the east.¹ Before desegregation orders were entered, only white students attended school in the City of Clinton. White students who lived within the area served by the Clinton Attendance Center but outside the city were bussed to the city schools. Black pupils residing within the Attendance Center area were transported to all-black schools outside the City of Clinton.

Litigation to desegregate the schools in the Hinds County SD began in January 1967, with a complaint filed by the United States against the Hinds County School Board under the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a *et seq.* Initially the School Board's desegregation efforts relied upon freedom-of-choice plans. This court, however, found those plans to be inadequate in *United States v. Hinds County School Board*, 417 F.2d 852 (5th Cir. 1969), a consolidated case that included appeals from twenty-five separate school desegregation cases in Mississippi. Later that year, the Supreme Court substituted a now-and-at-once requirement for its previous all-deliberate-speed standard for desegregating school systems. *Alexander v. Holmes County Board of Education*, 396 U.S. 19, 90 S.Ct. 29, 24 L.Ed.2d 19 (1969). Following that decision this court directed that a plan proposed by the United States Department of Health, Education

1. Facts are taken from stipulations in the record on appeal.

& Welfare be implemented no later than December 31, 1969. *United States v. Hinds County School Board*, 423 F.2d 1264 (5th Cir. 1969), cert. denied, 396 U.S. 1032, 90 S.Ct. 612, 24 L.Ed.2d 531 (1970). This plan divided the county into seven attendance zones; students living within each zone were to attend the school within that zone, subject to the standard majority-to-minority transfer proviso; students whose race was in the majority in a school could transfer into a school in which their race was in the minority. One of the attendance zones comprised the City of Clinton plus some surrounding areas, but did not include the former Sumner Hill zone which contained two nearly all-black schools.

On January 5, 1970, the local Clinton Board of Education petitioned the Mayor and Board of Aldermen of the City of Clinton to establish a school district independent from the Hinds County SD. The Mayor and Board of Aldermen then passed an ordinance to create a separate district with boundaries that were coterminous with those of the Clinton Attendance Zone which would have been created by the HEW plan. Next, the state legislature passed a special act, thinly guised as a general law, to amend § 6411-01 of the Mississippi Code of 1942 (now § 37-7-637, Mississippi Code of 1972) to authorize the creation of the Clinton MSSD.² The final step came on May 18, 1970, when the state's Education Finance Commission approved the formation of the Clinton MSSD.³ On July 1, 1970, the Clinton MSSD began operation.

2. The Governor signed the law on April 3, 1970. The timing of the passage of this

The current phase of this sadly protracted litigation began almost five months later. On November 30, 1970, the Clinton MSSD sent the clerk of this court a motion to sever the Clinton MSSD from the Hinds County SD. Contrary to the opinion of the district court, that motion was filed by the clerk of this court on December 2, 1970. On January 14, 1971, then-Judge Griffin Bell wrote to counsel for the Clinton MSSD and explained that this court could not approve the separation without the consent of the other parties to the litigation. When counsel for the Clinton MSSD attempted to secure that consent, the United States Department of Justice declined to consent to the separation pending the Supreme Court's decision in other cases. With that letter from the Department of Justice, dated April 15, 1971, attempts to sever the Clinton MSSD apparently ended. The record reveals no further efforts by the Clinton MSSD to press this court for a decision. Thus, from its inception the Clinton MSSD operated independently of the Hinds County SD without the requisite judicial approval. See *Stout v. United States* [sic, Jefferson County Board of Education], 448 F.2d 403, 404 (5th Cir. 1971).

law is important only insofar as its effect on the process of desegregation. See p. 1192, *infra*. The Mississippi Constitution forbids local and private school legislation. See Miss. Const. art. 4, § 90(p).

3. On June 15, 1970, the Commission amended its earlier order to correct errors in the description of the boundaries of the district. The Hinds County School Board, which had once refused to approve the Clinton MSSD, did approve the new district "insofar as this Board is authorized to do" on May 14, 1970.

[1] Whatever the explanation for the delay in seeking judicial approval, as the district court quite properly recognized, the delay itself cannot determine the outcome of this case. Instead, the courts must evaluate "the effect of the action upon the dismantling of the dual school systems involved." *Wright v. Council of City of Emporia*, 407 U.S. 451, 92 S.Ct. 2196, 2203, 33 L.Ed.2d 51, 61 (1972) (emphasis in original). Because of the peculiar procedural status of this case, the courts may see the actual results of the separation rather than relying on prediction as the Court did in *Emporia, supra*, and its companion case, *United States v. Scotland Neck City Board of Education*, 407 U.S. 484, 92 S.Ct. 2214, 33 L.Ed.2d 75 (1972). Yet even here the district court's view of the facts was clouded by a pending annexation of part of Hinds County by the City of Jackson. Now we also know these results and the Hinds County SD has lost an area to the long-existing Jackson Municipal Separate School District which took, 4,470 students, 29% black and 71% white, from the Hinds County SD.⁴

4. Residents of the annexed area challenged the annexation, alleging that they were denied equal protection because they were not allowed to vote on the annexation. The Mississippi Supreme Court rejected that challenge in *Lowe v. City of Jackson*, 336 So.2d 490 (Miss.), cert. denied, 429 U.S. 980, 97 S.Ct. 493, 50 L.Ed.2d 589 (1976). Early in 1977 the district court approved a plan of pupil assignment for the newly annexed area. *Singleton v. Jackson Municipal Separate School District*, Civ. Action No. 3379 (S.D.Miss., Jan. 31, 1977). No challenge has been made to the effect of this annexation on the Hinds County SD.

[2, 3] Nevertheless, in attempting to determine the effect of Clinton MSSD's separation, the district court erred when it measured effect by noting that the boundaries adopted by the Clinton MSSD were the same as the zone boundaries drawn by HEW. The process of desegregation is not a static process with lines and markers once set being fixed for all time. Instead the process is often one of trial and error; if one set of zones proves ineffective, then another must be drawn and, if necessary, another, or some yet different approach be tried. The question here is whether by creating a separate school district whose lines were not subject to this ongoing process, the Clinton MSSD "hinders or furthers the process of school desegregation." *Emporia, supra*, 407 U.S. at 460, 92 S.Ct. at 2202. By excising itself from the rest of the Hinds County SD, the Clinton MSSD instantly established a barrier that prevented its schools from being part of the majority-to-minority transfer program. The effect of that fact also must be considered along with the broader impact of the permanency of the Clinton MSSD boundaries (as opposed to the tentative nature of the HEW boundaries).

In determining the effect of these conditions on its overall ability to achieve a unitary school system in the Hinds County SD, the district court should keep in mind the tests approved in *Emporia* as they were applied in *Scotland Neck*. In *Emporia* the Court first noted the disparity in the racial composition of the two districts.⁵ But in saying that there

5. The county-wide system had a racial composition of 34% white and 66% Negro.

was more to the case than the racial disparities, the Court relied upon three other tests to determine the permissibility of the school district's separation: (1) changes in student composition, that is, whether the separation of the school district caused a change in the student composition of the districts; (2) changes in educational quality, that is, whether the school buildings, facilities, and other assets taken into the splinter district are superior to those in the surrounding county; and (3) timing, that is, whether the existence and operation of the splinter district conveys to the black students a message of their inferiority.⁶ See *Ross v. Houston Independent School District*, 559 F.2d 937 (5th Cir. 1977).

Emporia emphasizes that the primary responsibility for evaluating effect lies with the district court. Therefore, we remand this case to that court for further consideration. Unless a determination can be made that the separate existence of the Clinton

MSSD's separation could not be used to establish an impermissible motive. Indeed, our ruling assumes that the motives of the Clinton MSSD are free from any taint. The question is not one of motive but of effect.

7. The "proper role" (see *Stout v. Jefferson County Bd. of Educ.* 466 F.2d 1213, 1214 (5th Cir. 1972) for Clinton MSSD in the desegregation of Hinds County is not an all-or-nothing matter. For example, it may be found best for it to assimilate Lovett and Sumner Hill into its system, or to pair some of its schools with these schools in preference to outright dissolution and assimilation by Hinds County SD. Other viable alternatives may be suggested by the parties. The judgment as to which is best is assigned initially to the district court.

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
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November 14, 1977

Mr. John H. Fox, III
Attorney at Law
Post Office Box 22547
Jackson, Mississippi 39205

No. 76-4436 - U.S.A. v. Hinds County School
Board, Et Al.

(Opinion Rendered - 9-26-77)

Dear Counsel:

With reference to your motion to stay issuance of the Court's mandate filed on behalf of Clinton Municipal Separate School District, the Court has directed that we advise you that in accordance with the procedure set out in Singleton v. Jackson Municipal Separate School District, 5th Circuit, 1970, 419 F.2d 1211, the Court's judgment as mandate issued to the Clerk of the district court on September 26, 1977, the date upon which the Court's opinion was released.

Accordingly, it will be necessary that a motion to recall and stay the mandate under Rule 41 F.R.A.P. be filed. Also, a memorandum in support of the motion to recall and stay mandate should be filed, setting forth good cause for stay, and advising the Court which points are to be relied upon on petition for certiorari.

Government counsel will be given 10 days from service of the motion to recall and stay within which to respond.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By *Richard E. Windhorst, Jr.*
Richard E. Windhorst, Jr., Chief,
Judicial Support Division

REW, JR:lgg
cc: Mr. Mark L. Gross

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

TEL 504-588-6514
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NEW ORLEANS, LA 70130

October 28, 1977

TO ALL PARTIES LISTED BELOW:

NO. 76-4436 - U.S.A. v. HINDS COUNTY SCHOOL BOARD,
CLINTON MUNICIPAL SEPARATE SCHOOL
DISTRICT

Dear Counsel:

This is to advise that an order has this day been entered denying the petition() for rehearing,* and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition() for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By *Brenda M. Hauck*
Deputy Clerk

*on behalf of appellee, Clinton Municipal Separate School District,

cc: Mr. Robert E. Hauberg
Mr. Walter W. Barnett
Mr. Mark L. Gross
Mr. Burtis M. Dougherty
Mr. Robert C. Cannada
Mr. John M. Putnam
Mr. John H. Fox, III
Mr. Peter M. Stockett, Jr.
Mr. Walter R. Bridgforth